STATE OF MICHIGAN

COURT OF APPEALS

RANDY KERNEN, WILLIAM PETSCH, and the JAMES KERNEN TRUST, Plaintiffs-Appellants,	UNPUBLISHED February 21, 2003
v	No. 229465 Oakland Circuit Court
CITY OF WALLED LAKE, Defendant-Appellee.	LC No. 99-016873-NZ

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right challenging two separate orders of dismissal that were entered pursuant to MCR 2.116(C)(10) and MCR 7.101(G), respectively. We affirm.

Plaintiffs own a parcel of property that is situated partly in the City of Walled Lake (the City) and partly in Commerce Township (the Township). Plaintiffs wanted to develop the property as a combination convenience store, gas station, and car wash. Plaintiffs brought this action in circuit court, challenging the constitutionality of defendant City's decision to rezone a parcel of their property from R-1A (single family residential) to C-1 (neighborhood commercial), rather than C-2 (general commercial) as requested by plaintiffs. Additionally, in their complaint, plaintiffs also appealed the decision by the City's zoning board of appeals denying plaintiffs' request for a use variance.

Plaintiffs first argue that the trial court erroneously granted the City's motion for summary disposition of their constitutional claims. Plaintiffs assert that the City's decision to zone the land to C-1 rather than C-2 was a violation of substantive due process. We disagree.

A trial court's decision concerning the constitutionality of an ordinance is reviewed de novo. *Bell River Assocs v China Charter Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997). Similarly, a trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994).

When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and drawing all reasonable inferences

in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); see also *Quinto, supra* at 367, 371-372 (a question of fact exists where there is sufficient evidence to allow a reasonable jury to find in the nonmoving party's favor).

Because zoning is a legislative act, the validity of a decision to rezone or to refuse to rezone is determined under the tests normally applicable to legislation. *Arthur Land Co, LLC v Ostego Co*, 249 Mich App 650, 662, 664; 645 NW2d 50 (2002); *Sun Communities v Leroy Twp*, 241 Mich App 665, 669-670; 617 NW2d 42 (2000). To prevail on a substantive due process claim, a plaintiff must prove "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Three rules of judicial review apply:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical *ipse dixit*; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Id.*, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Plaintiffs argue that the City's justifications for its decision are without foundation and, therefore, C-2 zoning is unreasonable and fails to advance any legitimate government interest. In particular, plaintiffs complain that the City considered the particular uses requested rather than C-2 zoning in general. They argue that with a well-designed site plan, C-2 uses could be compatible with adjoining residential uses. Additionally, they argue that some C-2 uses would be compatible with the amended master plan and future land use map. They claim the Township's B-2 zoning is more similar to the City's C-2 zoning than to C-1, although they concede the Township does not allow gas stations or car washes in the B-2 district. Plaintiffs argue that some C-1 uses generate more vehicular traffic than a gas station and car wash. They claim C-2 zoning would allow them to develop the property in conjunction with the Township property. Lastly, plaintiffs note that some people do not agree a gas station and car wash would be an inappropriate gateway development into the City.

Plaintiffs' arguments do not undermine the reasonableness of the City's interests or do they tend to show the decision was arbitrary, capricious, or unfounded. The planning commission found that the proposed C-2 zoning would be incompatible with adjacent residential uses, would be inconsistent with the master plan, would not create a desirable gateway into the City, and would increase traffic congestion in the area. The city council agreed and rezoned the property to C-1. Concerns about overcrowding, traffic congestion, compatibility with existing uses and other health, safety, and welfare issues are clearly legitimate and reasonable. See MCL 125.581(1); see also *Kropf v Sterling Heights*, 391 Mich 139, 159, 160; 215 NW2d 179 (1974).

Public opinion is also a legitimate factor to consider in deciding whether to grant a petition for rezoning. *A & B Enterprises v Madison Twp*, *supra* at 164.

Additionally, "the validity of a law has nothing to do with the motivation of the legislators who enact it." *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 528; ___ NW2d ___ (2002). As this Court observed in *Pythagorean, Inc*, "'[b]ad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives.'" *Id.*, quoting *Sheffield Development Co v Troy*, 99 Mich App 527, 530-531; 298 NW2d 23 (1980). "Thus, the motivation of legislators who actually approve or reject zoning proposals is irrelevant to a determination of the validity of those actions." *Pythagorean*, *supra* at 528. Similarly, the motivations of planning commission members, who conduct public hearings and give a recommendation to the legislature, are also irrelevant. *Id.*

At best, plaintiffs have shown that the wisdom of rezoning the area as C-1 rather than C-2 is debatable. However, this Court is not to consider the wisdom or lack of wisdom of the City's reasons for its decision. *Kropf*, *supra* at 161. The City has discretion to choose between reasonably differing views. Thus, plaintiffs have failed to show that there are questions of fact concerning the reasonableness of the City's zoning decision. The trial court properly granted summary disposition to defendant on that claim.

Plaintiffs also argue that the City's decision to zone the property C-1 rather than C-2 constitutes an unconstitutional taking of property without just compensation. We again disagree.

"Although the police power allows the government to regulate land use, the Fifth Amendment requires that compensation be paid if a government regulation unreasonably shifts social costs to an individual or individuals." *Paragon Properties Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996); see also *K & K Const, Inc v DNR*, 456 Mich 570, 576; 575 NW2d 531 (1998) (overburdening land with regulations can constitute a taking). "[L]and use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land." *Id.* at 576, relying on *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987). To show the first type of taking, "[t]he plaintiff must prove that the ordinance is unreasonable because it comprises an arbitrary, capricious, and unfounded exclusion of other types of valid land use from the subject area." *Bell River*, *supra* at 133. As discussed previously, plaintiffs failed to show a question of fact concerning the reasonableness of the City's decision to zone the land as C-1 rather than C-2.

"The second type of taking, where the regulation denies an owner of economically viable use of land, is . . . subdivided into two situations: (a) a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land,' *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional 'balancing test' established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)." *K & K*, *supra* at 576-577, 585.

Where a categorical taking is alleged, "a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property." *K & K, supra* at 577; see also *Frericks, supra* at 596. "A person may recover for this type of taking in the case of a physical invasion of his property by the government . . . or where a regulation forces an owner to 'sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . .'" *K & K, supra* at 577 (emphasis in original), quoting *Lucas, supra* at 1019; see also *Frericks, supra* at 595-596. In other words, when an owner is required "'to leave his property economically idle, he has suffered a [categorical] taking.'" *K & K, supra* at 586, quoting *Lucas, supra* at 1019. In the present case, there was no physical invasion of land. Thus, the question is whether plaintiffs have been required to leave the land "economically idle."

"The mere diminution of property value by application of regulations[,] without more[,] does not amount to an unconstitutional [categorical] taking." *Paragon, supra* at 579, n 13; see also *Bell River, supra* at 133. Rather, plaintiffs "must show that the property is either unsuitable for use as zoned or unmarketable as zoned." *Bell River, supra* at 133, quoting *Bevan v Brandon Twp*, 438 Mich 385, 403; 475 NW2d 37 (1991). In other words, plaintiffs must show "that if the ordinance is enforced the consequent restrictions on [the] property [will] preclude its use for any purpose to which it is reasonably adapted." *Bell River, supra* at 133, quoting *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 571; 398 NW2d 393 (1986). Here, plaintiffs failed to show that their property is literally unusable or unmarketable as zoned. Rather, they claim that zoning the parcel as C-1 rather than C-2 substantially reduces the value of their land and effectively deprives them of their reasonable investment-backed expectations for the entire parcel.

Where, as here, a claimant cannot show a categorical taking because there has been only a diminution in the value, the traditional balancing test applies. *K & K, supra* at 586-587. A reviewing court must consider "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K, supra* at 577, 587-588. "While there is no set formula for determining when a taking has occurred under this test, it is at least 'clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains.'" *K & K, supra* at 588, quoting *Bevan, supra* at 391. "[T]he effect of the regulation must be viewed with respect to the parcel as a whole." *K & K, supra* at 578.

Plaintiffs argue that applying the setbacks contained in an earlier consent judgment to the portion of land located in the City results in nearly 58,000 square feet of excess unusable land, which greatly reduces its value. The value of the land located in the Township is also reduced because, if developed separately, only a smaller building could be constructed. If the land located in the City had been rezoned to C-2, however, it could have been developed in conjunction with the land located in the Township, yielding a more typical land to building ratio, no excess land, and no reduction in the value of the land as a whole.

Plaintiffs' argument has several flaws. First, the land was purchased as a whole, plaintiffs seek to develop it as a whole and, therefore, it must be considered as a whole. See *K & K, supra* at 578-585. Second, plaintiffs agreed to the setback limitations in the consent judgment and

those setbacks would have applied regardless of how the parcel was zoned. Further, because the consent judgment required compliance with the Township's B-2 zoning, which does not allow gas stations or car washes, plaintiffs could not have located such uses on the City's portion of the parcel even if it were zoned C-2 (unless and until the consent judgment or the Township's zoning ordinance were amended).

We conclude that the trial court correctly found that plaintiffs failed to show a question of fact concerning whether zoning the land as C-1 rather than C-2 constituted an unconstitutional taking of property without just compensation. Therefore, summary disposition on that claim was properly granted.

Lastly, plaintiffs argue that the trial court erred in dismissing their appeal from the zoning board of appeals' denial of their request for a variance. We conclude that this issue is not properly before us. An appeal from a decision of the zoning board of appeals is an administrative appeal. See *Paragon*, *supra* at 580-581. Because this issue stems from an appeal to the circuit court, which is not appealable as a matter of right to this Court, see MCR 7.203(A)(1)(a), this Court lacks jurisdiction to consider it.[1]

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] We note, however, that a trial court may properly dismiss an administrative appeal for failure to file the administrative record. See MCR 7.101(G); see also MCR 7.101(F)(1); MCR 7.104(A).